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Nos. 87-821, 87-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, *et al.*,
Petitioners,

v.

JAMES SEBBEN, *et al.*,
Respondents.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

JAMES SEBBEN, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN INSURANCE ASSOCIATION AND NATIONAL COUNCIL ON COMPENSATION INSURANCE IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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Amici curiae,[1] the American Insurance Association and the National Council on Compensation Insurance respectfully request that the Court grant the Petitions

1. In accordance with Rule 36.1, the written consent of the Pittston Coal Group, *et al.*, the Solicitor General, and James Sebben, *et al.*, are being submitted herewith.

for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 25, 1987.

INTEREST OF AMICI CURIAE

The American Insurance Association (hereinafter "AIA") is an independent, not-for-profit insurance industry trade association whose membership is composed of approximately 200 property-casualty insurance companies and their subsidiaries. AIA provides a variety of services to its members and, from time to time, represents their collective interests in the course of litigation of special significance.

The National Council on Compensation Insurance (hereinafter "NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes over seven hundred insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout the United States. In thirty-five states, including most major coal mining states, NCCI proposes and administers premium rates and rating plans for workers' compensation insurance. NCCI also manages the National Workers' Compensation Reinsurance Pool (hereinafter the "Pool"). The Pool reinsures several categories of risk that arise under the federal Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1986) (hereinafter the "Act"). In particular, the Pool is the only commercial insuring vehicle available to small and high risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from an

insurance carrier. NCCI's members and many AIA members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, from 15-20% of all federal claim liabilities are insured or reinsured by the Pool.

The Pool, NCCI's members, and AIA's members have voluntarily made commercial insurance available to mine operators for their liabilities arising under the federal Act. While mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by the U.S. Department of Labor and was asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[2] Given repeated assurances by the Department and the Congress during the period from 1973 to the present day that the black lung claims process would, notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, coverage has been made continuously available at affordable rates. As a result of pervasive liberalizations of entitlement criteria in the Black Lung Benefits Reform Act of 1977, Pub. L. No.

2. *Hearings on H.R. 10760 and S. 3183 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

95-239, 92 Stat. 95 (1978),[3] it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress, worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[4] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund,* 97th Cong., 1st Sess. 16, 30 (Comm. Print 1981); *see also,* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing ... this retroactive liability.... [T]he combined effect of the 1977 law requiring the automatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and

3. In 1977 provisions, Congress directed the review of all pending and previously denied black lung claims under greatly liberalized eligibility standards, 30 U.S.C. §§ 902(f)(2), 945. The Department of Labor's regulatory implementation of those standards is the central subject of this litigation.

4. This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981). But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers' tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 30 U.S.C. § 934. The Fund is currently over $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

The decision of the Eighth Circuit demands a replay of the 1977 amendments. It requires the Secretary of Labor to reopen approximately 94,000 closed claims[5] which were previously denied under the exceptionally generous eligibility criteria adopted by the Secretary following the 1977 amendments to the Act, and to readjudicate them under a different set of eligibility regulations. The eligibility standards mandated for use in these cases by the Eighth Circuit are set forth in regulations promulgated by the Social Security Administration (hereinafter "SSA") in 1972 (20 C.F.R. § 410.490 (1987)). The SSA rule does not, by its plain language, apply to Department of Labor claims. The Department of Labor's rules are at 20 C.F.R. § 727.203 (1987). Both rules establish a rebuttable presumption of eligibility for benefits under the Act. The SSA presumption is more easily invoked in some cases, but, according to the circuits, is not generally rebuttable. Section 410.490 is rebutted only if the miner "is either doing or capable of doing his usual coal mine work" whether or not the inability to work is black-lung related. *Broyles* v. *Director, Office of Workers' Compensation Programs,* 824 F.2d 327, 329 (4th Cir. 1987), *petition for cert. filed,* (Dec. 29, 1987) (No. 87-1095). "Section 410.490 cannot be rebutted by medical evidence." *Cook* v. *Director,*

5. The Petition for a Writ of Certiorari filed by the Solicitor General in No. 87-827 at 11 suggests this figure. Other data compiled by the Congress in 1981 suggest that approximately 155,000 claimants would be within the class to be certified. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office, Sam Church, Jr., President, United Mine Workers of America, Charles Coakley, AIA).

Office of Workers' Compensation Programs, 816 F.2d 1182, 1185 (7th Cir. 1987). By contrast, the Labor Department's presumption may be rebutted by the defendant if the relevant medical proof establishes that the miner is not totally disabled by, or does not suffer from, or did not die due to black lung disease. 20 C.F.R. § 727.203(b); *see Mullins Coal Co., Inc. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 432 (1987). Section 410.490, as it has been interpreted, provides benefits whether or not a miner's absence from the workplace is caused by black lung disease, and in some instances, whether or not the miner actually suffers from this occupational disease. *See Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185; *compare* 20 C.F.R. § 410.490(c) *with* 20 C.F.R. § 727.203(b).

Thus, as amici see it, the Eighth Circuit's mandate requiring the application of section 410.490 in tens of thousands of previously denied and closed cases completely revises the premise upon which federal black lung insurance was offered to the mining industry. It is a betrayal of the promises reflected in the statute and in the longstanding and consistent representations made by Congress and the federal agencies. In offering this insurance, the insurance industry did not, was not asked to, and surely would not have made federal black lung benefit coverages available to pay benefits on account of the non-occupational disabilities or the retirement of coal miners. It would not have provided an insurance product guaranteeing the payment of claims where the meaningful right to defend those without merit is largely precluded. The Eighth Circuit's decision, if it

stands, has rewritten not only the law, but our insurance contracts as well to these effects.

Amici have a direct, substantial, and dramatic interest in this matter.

REASONS FOR GRANTING THE WRITS

1. This subject matter has generated five pending petitions for certiorari.[6] We need not detail the several grounds supporting certiorari set forth by the Solicitor General and the other petitioners. There is a division in authority in the circuits. This split directly and immediately affects the ten thousand or so pending claims potentially subject to adjudication under section 410.490, *see Mullins Coal Co., Inc. of Virginia*, 108 S. Ct. at 430, and puts in jeopardy the status of nearly one hundred thousand others, many of which were closed long ago. The Eighth Circuit's decision vastly exceeds the jurisdictional boundaries of 28 U.S.C. § 1361 and impermissibly abrogates principles of res judicata. It raises questions, noted by both the mine owner and insurance carrier petitioners as well as the Solicitor General, concerning the constitutional adequacy of the eligibility standards embraced by the court below.[7]

6. In addition to these two petitions, petitions for certiorari have been filed in *Director, Office of Workers' Compensation Programs* v. *Charlie Broyles*, (U.S. Dec. 29, 1987) (No. 87-1095); *Director, Office of Workers' Compensation Programs* v. *Fred Kyle*, (U.S. Dec. 21, 1987) (No. 87-1045); and *National Council on Compensation Insurance* v. *Fred Kyle*, (U.S. Dec. 21, 1987) (No. 87-1065).

7. The constitutional problem presented is underscored by this Court's observation in *Mullins Coal Co., Inc. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. at 440 n.32, that "[t]here is some question whether pneumoconiosis, for example, can be considered 'proved'—and therefore serve as the constitutional predicate for presuming ultimate facts—if evidence tending to disprove pneumoconiosis is not permitted to be considered on invocation." Under section 410.490, total disability due to pneumoconiosis is presumed on the basis of evidence that cannot prove this set of facts, but the

And finally, on the merits, the Secretary of Labor's regulation, 20 C.F.R. § 727.203, does not depart from the mandate of the Act at 30 U.S.C. § 902(f).

2. Of more immediate concern to amici is the potential economic chaos that would surely follow a wholesale readjudication of closed claims under section 410.490, as well as its application to thousands of active claims. NCCI, which is in the business of evaluating risks, has devoted considerable resources to an examination of the impact and implications of the decision below. The exercise is a difficult one given the variable factors that naturally arise in individual claims and the differing applications of section 410.490 that have evolved in the circuits.

Under the more conservative set of assumptions, it is estimated that relitigation of all claims in the putative class identified by the Eighth Circuit will add from two to four billion dollars in benefit liabilities to the obligations of the Black Lung Disability Trust Fund and from one to two billion dollars in liabilities to the obligations of individual mine owners, the Pool, and other insurers, exclusive of administrative and litigation costs.[8] The

evidence tending to disprove the presumed facts is legally irrelevant and cannot be considered at all, at least in the Third Circuit, *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922, 924 (3d Cir. 1987), and the Fourth Circuit, *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 829-30. The Eighth Circuit has not yet decided the rebuttal question but it is pending. *Consolidation Coal Co.* v. *Smith*, No. 86-2397 (argued Oct. 16, 1987).

8. The Secretary's Petition for a Writ of Certiorari at 12 suggests that a re-review might not change the result in many cases, reasoning that the presumption would be rebutted with frequency. While there is logic to the statement, we think it is divorced from reality. The Department of Labor never made any significant effort to rebut its own presumption and this is well documented. *See* Comptroller General of the U.S., *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (1982). As to rebuttal by employers, there is little evidence that this is a reasonable prospect. The section 410.490 presumption is a rule of evidence of exceptional

aggregate costs of administration and litigation of tens of thousands of claims would surely add hundreds of millions of dollars to the estimates. A worst case model, in which rebuttal under section 410.490 is virtually impossible and in which the benefit of section 410.490 is extended to include miners with more than ten years of coal mine employment, could double these estimates.[9]

While circumstances such as these easily lend themselves to overstatement, the simple fact of the matter is that the Eighth Circuit's decision mandates a result that is inequitable and unaffordable. It interprets the scope of the federal black lung statute far beyond its intended purpose and makes a mockery of fundamental defensive rights. It advances the proposition that the insurance industry was imprudent in placing reasonable reliance upon Congress's and a federal agency's longstanding assurances that the new risks they created would be predictable and thus commercially insurable.

The Eighth Circuit's decision is intolerable, not only for these reasons, but for the precedent it sets for any future time the Congress creates an entirely new risk of loss that must be funded through commercial insuring arrangements.

force that as of December, 1980 produced $9 billion in benefits to claimants in a program that existed for only 3½ years. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, supra*, n.5 at 3 (testimony of Morton E. Henig, U.S. General Accounting Office). Amici have no confidence and no reason to believe that this truly remarkable provision can be applied in a way that permits a fair hearing on the merits in any case.

9. Logically, section 410.490 would almost surely be applied in these cases involving ten or more years of employment. There is no basis upon which it would be proper to treat longer term miners less favorably than short term miners. Clearly, the Fourth Circuit would apply section 410.490 in all claims filed before April 1, 1980. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329.

CONCLUSION

Amici urge the Court to grant these petitions.

Respectfully submitted,

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